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No. 87-2085

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ARKANSAS STATE BOARD OF EDUCATION, *et al.*,

Petitioners,

v.

LITTLE ROCK SCHOOL DISTRICT, *et al.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JOSHUA RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

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In the
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October Term, 1988

No. 87-2085

ARKANSAS STATE BOARD OF EDUCATION, et al.,

Petitioners,

v.

LITTLE ROCK SCHOOL DISTRICT, et al.,

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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JOSHUA RESPONDENTS' BRIEF IN OPPOSITION TO CERTIORARI

REASONS FOR DENYING THE WRIT

I

There Is No Conflict Among The Circuits That Warrants Review By This Court

Petitioners suggest that this Court should grant review of the decision below because there is a significant conflict among the Courts of Appeals with respect

to the application of the Eleventh Amendment in school desegregation actions. According to Petitioners, the Sixth Circuit in Kelley v. Metropolitan County Board of Education, 836 F.2d 986 (6th Cir. 1987), cert. denied, 56 U.S.L.W. 3864 (U.S. June 20, 1988), held, contrary to the court below, that the Eleventh Amendment bars a federal court from requiring state agencies that committed Fourteenth Amendment violations to participate in remedying the effects of those violations -- including by helping to fund appropriate remedial and compensatory educational programs for the victims of unlawful segregation.[1]

In Kelley, many years after a desegregation remedy was implemented, the school district filed a third-party

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[1]This Court specifically approved such remedies in Milliken v. Bradley, 433 U.S. 267 (1977).

complaint against state authorities (who had not previously been joined as parties in the lawsuit), seeking reimbursement of its prior remedial expenditures and contribution toward the continuing costs of the remedy. Although the district court granted the prospective relief, 615 F. Supp. 1139 (M.D. Tenn. 1985), the Sixth Circuit reversed. It noted that shortly after this Court's decisions in Brown I[2] and II,[3] Tennessee statutes requiring school segregation were declared invalid by the State's Supreme Court;[4] that Tennessee state educational authorities were not thereafter made parties to the desegregation

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[2]Brown v. Board of Education, 347 U.S. 483 (1954).

[3]Brown v. Board of Education, 349 U.S. 294 (1955).

[4]See 836 F.2d at 994, citing Roy v. Brittain, 201 Tenn. 140, 297 S.W.2d 72 (1956).

lawsuits against Nashville[5] and Davidson County[6] which were eventually consolidated in the Kelley action; that no post-Brown violations contributing to the perpetuation of school segregation were proved against state authorities and no relief was granted against them at earlier stages of the Kelley litigation; and that the district court's judgment on the third-party complaint was not based upon any post-Brown segregative conduct of state officials. See 836 F. Supp. at 989-90, 993-94. Under these circumstances, the Sixth Circuit held, the Eleventh Amendment barred the district

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[5]Kelley v. Board of Education of Nashville, Civ. No. 2094 (M.D. Tenn.); see id., 3 Race Rel. L. Rep. 15, 17 (M.D. Tenn. 1957)(school board invites Attorney General of State to appear as amicus curiae).

[6]Maxwell v. County Board of Education of Davidson County, Civ. No. 2956 (M.D. Tenn.); see id., 5 Race Rel. L. Rep. 1040, 1041 (M.D. Tenn. 1960)(no state officials named as defendants in case).

court's entry of an Order requiring fiscal contribution from the State to the local school district.[7]

This case is distinguishable from Kelley on two grounds. First, the Arkansas State Board of Education was joined as a party when this lawsuit was commenced in 1982.[8] All of the relief ordered against

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[7]The same result has been reached, although not explicitly on Eleventh Amendment grounds, by the Eighth Circuit and the Fifth Circuit. See United States v. Arkansas, 791 F.2d 1573 (8th Cir. 1986)(order requiring state contribution to cost of desegregation plan reversed where hearings on state liability never held and findings on state liability never made); United States v. Texas Education Agency, 790 F.2d 1262, 1264 (5th Cir. 1986), cert. denied, ___ U.S. ___, 107 S. Ct. 874 (1987)(school board effort to obtain contribution from state authorities toward cost of desegregation remedy properly denied where remedy order "seems to indicate unmistakably that the only culpable party was the [local district]").

[8]The scope of state involvement in, and responsibility for, school segregation in Pulaski County was not fully litigated

(continued...)

the State Board by the district court in 1984,[9] by the en banc Court of Appeals in 1985,[10] and by the Court of Appeals in the decision below, of which Petitioners seek

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[8](...continued)

prior to the filing of this case. The relief previously granted against state officials in proceedings ancillary to a school desegregation action involving the Little Rock School District, e.g., Aaron v. Cooper, 156 F. Supp. 220 (E.D. Ark. 1957), aff'd sub nom. Faubus v. United States, 254 F. 2d 797 (8th Cir. 1958), was limited and prohibitory in nature; it was based upon direct state interference with the execution of the federal district court's remedial orders. The findings of the courts below, however, delineate the long-maintained deliberate efforts of state authorities to thwart constitutionally mandated desegregation after Brown. See cases cited infra nn.9 & 10.

[9]Little Rock School District v. Pulaski County Special School District, 597 F. Supp. 1220 (E.D. Ark. 1984); see also id., 584 F. Supp. 328 (E.D. Ark. 1984).

[10]Little Rock School District v. Pulaski County Special School District, 778 F.2d 404 (8th Cir. 1985), cert. denied, ____ U.S. ____, 106 S. Ct. 2926 (1986).

review,[11] is grounded upon a record demonstrating -- and findings of -- intentionally discriminatory conduct by state officials which exacerbated and perpetuated unlawful school segregation in violation of the Fourteenth Amendment, long after the Brown decisions. In the absence of such findings, it is clear that the court below would not have required the monetary contribution toward a comprehensive remedy which Petitioners now attack. See United States v. Arkansas, supra note 7.

Second, this litigation involves a claim by plaintiff-intervenors Joshua, et al., black schoolchildren and their parents, that complete relief to eliminate the

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[11] Little Rock School District v. Pulaski County Special School District, 839 F.2d 1296 (8th Cir. 1988), pet. for cert. filed, 57 U.S.L.W. 3007 (U.S. June 20, 1988).

remaining vestiges of the dual school system within and among the three school districts in Pulaski County, Arkansas can be achieved only with the participation and resources of state, as well as local authorities. The courts below sustained this claim several years ago, and this Court declined to disturb their determinations. See supra notes 9 & 10. Thus, this case could not be more different from Kelley, where the Court of Appeals for the Sixth Circuit said:

> It bears emphasis that we are not here called upon to adjudicate the rights of plaintiffs suing to obtain the equal educational opportunities promised them in Brown . . . .

836 F.2d at 989.

There is no conflict between the ruling below and the Sixth Circuit's decision in Kelley, and the instant Petition should be denied.

II

The State Did Not Raise Below Its Argument That A Federal Court May Not Require Monetary Contribution By State Authorities To A Desegregation Remedy Without First Finding That Local School Districts Are Unable To Pay The Costs of the Remedy

Petitioners argue that this Court should determine the question whether a federal court may order any remedy involving financial contribution by state agencies to the costs of a desegregation plan without first making a finding that the local jurisdiction is otherwise unable to implement the remedy.[12] This, Petitioners claim, is the approach taken by the Sixth Circuit in Kelley.

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[12]Petitioners' statement of the Questions Presented includes this issue as part of their formulation of the Eleventh Amendment question (Petition, at i) but Petitioners treat it as a separate argument in support of granting the Writ (see id. at 10-12).

Petitioners did not raise this claim in the Court of Appeals.[13] It is therefore

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[13]There is only one off-hand reference to the issue in the State Board of Education's Petition for Rehearing and Suggestion for Rehearing En Banc:

> This expansion of the 1985 remedy levied against the State Board is substantial and comes without any findings of fact to establish that these programs are needed, or if needed, that the LRSD is unable to fund them from its own resources.

Id. at 5. The Certificate of Counsel required by 8th Cir. Rule 16(d), however, did not identify the issue as one requiring decision:

> (2) I express a belief, based on a reasoned and studied professional judgment, that this appeal raises the following questions of exceptional importance:
>
> (a) Whether the extensive remedies now sought to be imposed upon the State Board of Education exceed the scope of its constitutional violations contrary to the Supreme Court's ruling in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 16 (1971).

(continued...)

not properly presented for review in the present Petition. E.g., Delta Airlines, Inc. v. August, 450 U.S. 346, 362 (1981); see, e.g., Youakim v. Miller, 425 U.S. 231, 234 (1976).

Moreover, Petitioners failed to raise the question when they sought review of the en banc Court of Appeals' 1985 decision which instructed (without determining that the local school system could not afford the remedy), that the "additional cost of [compensatory and remedial] programs [in the Little Rock district] shall be paid for by the State of Arkansas," 778 F.2d at

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[13](...continued)

> (b) Whether the order for extensive additional funding by the State Board of Education violates the Eleventh Amendment to the United States Constitution under Milliken v. Bradley, 433 U.S. 267 (1977).

Petition for Rehearing and Suggestion for Rehearing En Banc, at iii.

435; Supplemental Appendix to Petition for Writ of Certiorari, at 114.[14] They have accordingly waived their right to seek review on the issue at this time.[15]

Even if that were not the case, there is no inconsistency between the holding below and the approach of the Sixth Circuit in Kelley. Nothing in the Kelley opinion suggests that the Sixth Circuit would disapprove an order that required state authorities, who themselves had violated the Fourteenth Amendment, to participate in the implementation of an adequate remedy, through financial contribution or otherwise. The Sixth Circuit approved such orders in

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[14] See Petition for Writ of Certiorari, No. 85-1547.

[15] See also Petition, at 15 (" . . . the State Board . . . believed it was completely satisfying its constitutional obligations by stipulating to and funding the implementation of various magnet schools and other remedies required of it by the 1985 opinion")(emphasis supplied).

Columbus Board of Education v. Penick, 663 F.2d 24 (6th Cir. 1981), cert. denied, 455 U.S. 1018 (1982); Reed v. Rhodes, 662 F.2d 1219 (6th Cir. 1981), cert. denied, 455 U.S. 1018 (1982).

The discussion in the Kelley opinion about the local school district's ability to implement a court-ordered desegregation remedy without fiscal assistance from state authorities appears immediately after the court's language emphasizing that the plaintiff black schoolchildren in Kelley made no claims against the State. See 836 F.2d at 989-90. In that context, the discussion in Kelley implies that the Sixth Circuit would require monetary contribution by state authorities, even in the absence of findings of state liability such as were made here, if the local district could not adequately fund a program of relief which was constitutionally required in order

to vindicate the rights of the minority pupils.

In view of the extensive constitutional violations which the courts below found to have been committed by Petitioners, their claim to immunity from orders requiring them to participate, along with local school systems, in redressing the continuing effects of those violations is plainly insubstantial and does not merit plenary review by this Court.

III

The Court Of Appeals' Clarification Of Its 1985 Ruling Did Not Improperly Expand The Scope Of The Remedy Nor Incorrectly Disregard The Findings Of The District Court

In a final attempt to contrive a justification for granting review of the decision below, Petitioners assert that the panel's opinion improperly "expanded"

the scope of the State Board's remedial obligations beyond that imposed by the earlier en banc opinion in 1985 and failed to give appropriate "deference" to the district court's conclusions concerning the appropriate scope of the remedy required by that earlier opinion. These representations are completely without foundation; in any event, they hardly represent the type of important, recurring question that demands the time and attention of this Court. See Sup. Ct. Rule 17.

The decision below marked no departure from the earlier holding of the en banc court. The panel merely clarified the intended meaning of the phrase "all- or nearly all-black" used in the 1985 en banc decision, which had been construed too narrowly and literally by the district

court on remand from that ruling. See 839 F.2d at 1307; Pet. App. at A-25.[16]

Petitioners pressed their interpretation by seeking rehearing of the panel's ruling by the en banc Court of Appeals, but it was denied without dissent (Pet. App. at A-1). It is thus reasonable to conclude that the judges who joined the majority opinion for the en banc court in 1985 accept the interpretation adopted and clarified by the panel.

Similarly, what Petitioners characterize as the district court's "finding" ("that this is not an appropriate case for State funding of compensatory and remedial education programs" (Pet. at

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[16]Similarly, the panel opinion clarified the intentions of the en banc court in establishing remedial guidelines for student assignment in Pulaski County. 839 F.2d at 1304-05; Pet. App. at A-19 to A-20.

18)),[17] to which the court below ostensibly failed to give appropriate deference, rested entirely upon the very misconstruction of the en banc court's opinion that the decision below corrected. Under these circumstances, there was no violation of the "clearly erroneous" rule[18] because the trial court's statement is not a factual finding, and even if it were, it was obviously the product of a mistake of law. Pullman-Standard v. Swint, 456 U.S. 273, 287 (1982); United States v. United States Gypsum Company, 333 U.S. 364, 394 (1948).

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[17]The district court said (Petition at 18, quoting 659 F. Supp. at 366):

> Since there are no all-black schools in the LRSD student assignment plan, the conditions are not present which would trigger state financing of compensatory education as is obvious from the above language [from the 1985 en banc opinion, 778 F.2d at 435].

[18]See Petition at 19 n.5.

Conclusion

In Milliken v. Bradley, 433 U.S. 267, 287-88 (1977), this Court recognized that:

> Children who have been [as a result of a constitutional violation] educationally and culturally set apart from the larger community will inevitably acquire habits of speech, conduct, and attitudes reflecting their cultural isolation. . . . Pupil assignment alone does not automatically remedy the impact of previous, unlawful educational isolation; the consequences linger and can be dealt with only by independent measures. In short, speech habits acquired in a segregated system do not vanish simply by moving the child to a desegregated school. The root condition . . . must be treated directly by special training at the hands of teachers prepared for that task.

The clarification of the 1985 en banc opinion made by the panel below, and its remedial instructions to the district court, are faithful to that principle. See 839 F.2d at 1308. There is no basis for review

by this Court, and respondents respectfully pray that the writ be denied.

Respectfully submitted,

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